No. 15

In the

Supreme Court of the United States

OCTOBER TERM, 1962

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

Appeal from the Supreme Court of Texas

SUPPLEMENTAL BRIEF

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Appeal from the Supreme Court of Texas

SUPPLEMENTAL BRIEF OF APPELLANT REPUBLIC NATIONAL BANK

Republic National Bank of Dallas files this Supplemental Brief for two reasons. The first concerns appellee's contention that *12 U. S. C. §94* has been repealed or modified by later legislation. Secondly, since this case was submitted previously, the Texas Supreme Court has rendered a decision which should lay at rest appellee's claim that his action filed below is a local action.

The first issue, more specifically stated, is this: Republic National Bank relies on *12 U. S. C. §94* as supporting its position that the Texas Supreme Court erred in not ordering this suit as to it transferred to Dallas County, Texas. The statutory basis for that code section is an amendment to §5198, Revised Statutes of 1873; this amendment was enacted by ch. 80, Act of February 18, 1875, 18 Stat. 320. Appellee in his brief, and the Supreme Court of Texas in its opinion in the present case, refer to theories that this 1875 legislation has been repealed or modified by later enactments. Appellant touched on these theories in its brief (pp. 35-41) and its reply brief (pp. 12-13), and sought to show that they are insupportable. When this case was previously submitted on oral argument, certain questions by the Court indicated some interest in that contention, but on account of the limitation of time for argument that point was not covered as thoroughly as it might be. In response to that interest, appellant will examine in the first part of this brief appellee's claim of repeal in greater detail than has been done up to now, and show thereby that the 1875 enactment—as it affects this case—has not been repealed or modified by later legislation.

The second portion will be devoted to an examination of a recent Texas Supreme Court decision, *Langdeau v. Burke Investment Company, Tex. , 358 S. W. 2d 553* (delivered on June 20, 1962, since the prior submission of this case) and the effect of the holding therein on appellee's claim that this is a local action so as to come within the rule of *Casey v. Adams, 102 U. S. 66 (1880).*

I. APPELLEE'S CLAIM THAT 12 U.S.C. §94 HAS BEEN REPEALED OR MODIFIED BY LATER LEGISLATION IS INSUPPORTABLE.

A. Statutory matter; Basis of the claimed repeal.

At the outset, it is appropriate to set out for reference the statutory matter here involved. First, the 1875 enactment reads as follows:

> "That suits, actions, and proceedings, against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which said association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

This wording, modified in some particulars not here relevant,[1] now appears as *12 U. S. C. §94*. It was derived from wording which appeared in *§57 of the National Bank Act of 1864*,[2] reading as follows:

> "Sec. 57. That suits, actions and proceedings, against any association under this act, may be had in the circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county or municipal court in the county or city in which such association is located, having jurisdiction in similar cases; *Provided, however*, That all proceedings to enjoin the comptroller under this

[1]The original 1875 wording is now reflected as 12 U. S. C. §94 with slight modifications in wording. §94 refers only to "Actions and proceedings", where the original wording was "Suits, actions, and proceedings". The 1875 wording referred to "* * * any circuit, district, or territorial court of the United States, * * *"; the reference to circuit courts is deleted in §94. The 1875 word "title" becomes "chapter" in §94, and the first 1875 reference to "said association" becomes "such association".

[2]§57, ch. 106, Act of June 3, 1864, 13 Stat. 116.

act shall be had in a circuit, district, or territorial court of the United States, held within the district in which the association is located."

Appellee relies on §4, *ch. 290, Act of July 12, 1882, 22 Stat. 163*, in support of his contention that the 1875 legislation has been repealed [his brief, pp. 26-8]. The particular portion he relies on is the proviso, which reads:

> "* * * *Provided, however*, That the jurisdiction for suits hereinafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws or parts of laws in the United States inconsistent with this provision be, and the same are hereby, repealed."

This proviso has since been expressly repealed.[3]

In addition, certain legislation, passed in 1887 and re-enacted in 1888, was relied on by the Texas Supreme Court as responsible for repeal of the 1875 legislation. (See *161 Tex. 356, 341 S. W. 2d 166*, R. 373-374.) This wording—now embodied in *28 U. S. C. §1348*, and still in effect—read when enacted as follows:

> "That all national banking associations under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases

[3] §39, ch. 646, Act of June 25, 1948, 62 Stat. 994.

> the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State."[4]

In the light of the above legislative history, we now proceed to a consideration of the validity of the claimed repeal. Hereafter we will refer to these three enactments, respectively, as the 1875 act, the 1882 act, and the 1887 act, unless it is necessary to make specific reference to one of these statutes in a later phase of its history. As a rule, the changes in wording which these three statutes have gone through have little or no bearing on the issue here being considered. All of such changes have been minor variations in terminology, and have done nothing one way or the other to affect or vary the clear meaning of the respective statutes.

Since there has been no express repeal of the 1875 act, appellee must resort to a repeal by implication.

B. Repeal by implication is not favored and must be established by a clear and manifest intention, and appellee has failed to meet this burden.

The United States Supreme Court has, on various occasions, addressed itself generally to the subject of repeal by implication. One of its best pronouncements on that subject

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[4]This wording originally appeared as §4, ch. 373, Act of March 3, 1887, 24 Stat. 555. It was re-enacted as §4, ch. 866, Act of August 13, 1888, 25 Stat. 433. The portion following the semicolon was deleted by §24, ch. 231, Act of March 3, 1911 (paragraph 16), 36 Stat. 1092. By ch. 646, Act of June 25, 1948, 62 Stat. 933, the 1887 wording was again re-enacted, slightly modified, and placed in the Judicial Code. It reads as follows:

> (After a reference to certain specific actions not here relevant) "All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the states in which they are respectively located."

For many years, the 1887 wording was contained in 28 U. S. C. §41 (16); the code citation was changed in 1948.

appears in *United States v. Borden Co.*, *308 U. S. 188, 198-199 (1939)*:

> "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. * * * The intention of the legislature to repeal 'must be clear and manifest.' * * * It is not sufficient as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, 10 L. Ed. 987, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary'. There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, *pro tanto*, to the extent of the repugnancy'."

Likewise, in *State of Georgia v. Pennsylvania Railroad Co.*, *324 U. S. 439, 456-457 (1945)*, the court stated:

> "But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy."

The guidelines thus laid down make it clear that appellee has a difficult burden to sustain his claim of repeal by implication. If any other reasonable course is available, there will be no resort to such a repeal. Before an earlier statute is to be held repealed—in whole or in part—by a later one, the two must deal with the same subject matter, there must be a "positive repugnancy" between the two, and there must be a "clear and manifest" expression of intent to repeal. Even when all these are present, so disfavored is the concept of repeal by implication that it will be extended

only as far as any repugnancy goes; if it is possible to salvage any portion of the previous enactment, it will be salvaged.

The impossibility of an implied repeal here is clearly shown by a careful consideration of the 1875 act and the two acts which are claimed to repeal it. In such a consideration, we must be careful to determine exactly what subject matter is involved in this case; how—or if—that subject matter is covered in each of the acts under consideration; and whether—as to the subject matter involved in this case—the acts in question could "co-exist". We will now make that analysis.

C. There is no conflict as to state court venue in the 1875 act as against the 1882 act.

The first question is one of subject matter. Were this a discussion of national bank litigation generally, we might become involved in some legislative confusion. However, we need not become so involved because there is only one question before the Court: what is the *venue* of a suit against a national bank brought in a state court? It is only to the legislation dealing with this question that our attention must be directed. And, in simplification of our task, the provisions relating to state venue came through the various legislative acts unscathed.

Venue and jurisdiction of course are different concepts, yet the two can be—and often are—dealt with in the same statute. Such statutes, typically, say that a particular type of case is to be heard in a certain type of court in a certain

place. An example of this is *Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U. S. 635 (1945).* Involved there was a statute reading as follows:

> "Any party to a proceeding under this chapter aggrieved by any order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the Natural Gas Company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia. * * *"

This statute does not contain the words jurisdiction or venue; it deals solely with type of suit, type of court, and place of trial. In that, note how similar it is to the portion of the 1875 act under consideration here. In the *Panhandle* case, there was a belated challenge to the place of trial. This Court held such was a challenge to venue, and had been waived. It ruled (at *324 U. S. 638-639*):

> "We read §19(b) [the quoted statute] to invest all intermediate federal courts with the power to review orders of the Commission, provided, however, that if a Circuit Court of Appeals, rather than the Court of Appeals for the District of Columbia, is chosen, the parties may object that the particular circuit lacks the specified qualifications. Venue relates to the convenience of litigants. * * * The provisions of §19(b) plainly are of that character. * * * The general grant of authority in §19(b) to all the courts of appeal suggests that the question of which one should exercise the power in a particular case is a question of venue. * * * The objection of the City of Cleveland which came after judgment had been rendered came too late."

Thus, whatever else the 1875 act deals with, it definitely deals with venue of national bank cases in state courts. By

analogy to the *Panhandle* case, the fact that the 1875 wording provides, among other things, for *place* of trial is sufficient to sustain this. More than that, there has been a judicial construction by this Court which reaches the same conclusion and as this appellant believes is controlling. *(First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889)*, discussed in this appellant's previous Brief.) There, the national bank was sued outside its county. It did not assert its right to be sued in its home county until after trial on the merits, and was held to have waived its right to be sued in its own county. Only venue can be so waived; that decision, therefore, construed the 1875 act as dealing with venue.

We submit that we have demonstrated that a provision relating to venue can (and usually does) exist in the same statute with provisions on jurisdiction; further, that the 1875 act did deal with the subject of venue of suits against national banks in state courts.

We now turn to the 1882 act which provided, essentially, that *jurisdiction* for suits involving a national bank would be the same as *jurisdiction* for suits involving a state bank located where the national bank in question was located. It also provided for the repeal of "all laws or parts of laws" inconsistent with it.[5]

It is plain that the 1882 act does not relate to the place where a suit against a national bank may be maintained in

[5]A general repealer clause such as this adds nothing on the question of whether a later statute repeals an earlier one by implication. Indeed, such clauses have been thought to demonstrate an intent to save those portions of prior legislation not inconsistent with a later act. See 82 C. J. S., Statutes, §285; 50 Am. Jur., Statutes, §520.

a state court. The understandable language of the statute shows this. The crucial word is jurisdiction. To say that the 1882 act deals with state venue requires that the word "jurisdiction" in the 1882 act be construed as meaning "jurisdiction and venue". If the meaning of the word "jurisdiction" in this statute is to be enlarged to include "venue", it can only be so enlarged through factors other than the clear statutory language; the language itself does not authorize it.

At the outset, then, we reach the applicability of one of the basic rules relating to repeal by implication: that the intention to repeal must be "clear and manifest". Applying this rule places any claim of repeal here in an insurmountable dilemma. If it is "clear and manifest" that Congress intended that the 1882 act should repeal the 1875 act, then how is it such result cannot be sustained by resort to the wording alone? And, if extrinsic matter is needed to support an intent to repeal, how can it be said such intent is "clear and manifest"?[6] This is a dilemma appellee cannot and has not overcome.

But even if it is felt necessary and permissible to go beyond the wording of the 1882 act, there still is no support

[6]To determine the effect of a statute, the first question has to do with the intent of the legislature. The first inquiry in determining that intent is to the language used. *Flora v. United States, 357 U. S. 63, rehearing denied, 358 U. S. 871, 362 U. S. 972 (1958).* If a statute is clear and unequivocal on its face, there is no need to resort to such things as legislative history. *United States v. Oregon, 366 U. S. 643 (1961).* It is thus thought that the need to resort to extraneous sources to interpret the 1882 act is inconsistent with its having a "clear and manifest" intent to repeal.

for a "clear and manifest" repeal of the state venue provision of the 1875 act. The intent of Congress in enacting the 1882 proviso is well known. It has been decided judicially by two decisions of this Court.[7] Basically, that intent was to withdraw from the federal courts jurisdiction over suits brought by or against national banks based purely on their status as federal instrumentalities. Congress intended that thereafter, if national banks were to resort to the federal courts, they must do so on the basis of diversity or federal question jurisdiction in the same way that state banks, non-banking corporations, and individuals had to do. There is no doubt that the statute effected this intent. To that extent, then, the 1882 wording was inconsistent with (and thus repealed) those portions of the 1875 act—if any—which gave or purported to give the federal courts jurisdiction to hear all cases involving national banks. But that is as far as it went. An intent to put national bank and state bank litigation in courts of the same type for jurisdictional purposes is not inconsistent with the federal government's retaining a restriction on the venue of national bank litigation in state courts. The two intents can co-exist perfectly. Suppose, for example, the statutes of a particular state required suits involving five hundred dollars or more to be brought in that state's county courts. A suit against a national bank in the state courts would—by reference to state law—be brought in the county court; this would make

[7] *Continental National Bank v. Buford, 191 U. S. 119 (1903); Leather Manufacturers' Nat'l. Bank v. Cooper, 120 U. S. 778 (1887).*

the suit, for jurisdictional purposes, the same as one involving a state bank in that state.[8] But in determining which county court from a geographic standpoint, reference can still be made to federal law without violating the concept of identical jurisdiction for state bank and national bank litigation.

The fact that the 1875 venue requirement and the 1882 act can exist side by side negatives any "positive repugnancy" between the two acts. It negatives any "clear and manifest" intent to repeal. "When there are two acts upon the same subject, the rule is to give effect to both if possible."[9] Since it is possible to give effect to both acts, the claim of repeal by implication fails.

There is one further point. If the word "jurisdiction" in the 1882 act is interpreted as broad enough to encompass venue in state suits, it must certainly be broad enough to encompass venue in federal suits as well. If the word "jurisdiction" is held to have done away with all federal restrictions on state jurisdiction-and-venue in national bank suits, it must necessarily do away with all particularities of jurisdiction-and-venue in national bank suits in federal courts. Yet no federal decision has held the 1875 venue require-

[8] Insofar as the 1882 act required a reference to state laws to determine jurisdiction of national bank suits in state courts, it only continued a situation which had existed under previous legislation. Note, for example, the reference to state jurisdiction in the 1875 act, and in §57 of the 1864 legislation.

[9] *United States v. Borden Co.*, supra, *308 U. S. at 198.*

ments inoperative in federal courts.[10] This precedent as regards federal litigation is of long standing and should not be lightly disregarded.

For all the above reasons, it is clear that appellee has not and cannot meet the heavy burden imposed upon him to establish an implied repeal of the 1875 act by the 1882 act.

D. The 1875 act vs. the 1887 act; A complete divergence of subject matters.

Appellee has not seriously contended before this Court that the 1887 act (now *28 U. S. C. §1348*) operated to repeal the 1875 act. The Supreme Court of Texas, however, relied on §1348, not as having repealed the 1875 act, but as having limited it to suits against a national bank commenced in a federal court.[11] For that reason, it is appropriate to consider that contention.

The 1887 act, when enacted, provided in essence that for the purpose of actions by and against them, national banks would be deemed citizens of the states in which they are located. This enactment has likewise been construed as having an intent similar to that of the 1882 act: to prevent national banks from using federal courts solely because of their status as federal instrumentalities.[12] That being true, most of the things said about the 1882 act apply as well to the 1887 act. An intent to restrict the national banks' right

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[10] *Cope v. Anderson, 311 U. S. 461, 467 (1947); Buffum v. Chase Nat'l. Bank, 192 F. 2d 58 (7 Cir. 1951), cert. den. 342 U. S. 944 (1952); Leonardi v. Chase Nat'l. Bank, 81 F. 2d 19 (2 Cir. 1936), cert. den. 298 U. S. 677; International Refugee Organization v. Bank of America, 86 F. Supp. 884 (S. D. N. Y. 1949); Schmitt v. Tobin, 15 F. Supp. 35 (D. C. Nev. 1935); Swift v. Fourth National Bank of Columbus, Georgia, 205 F. Supp. 563, 565 (M. D. Ga. 1962).*

[11] R. 373-374; *161 Tex. 356, 341 S. W. 2d 161.*

[12] *Continental Nat'l. Bank v. Buford, 191 U. S. 119 (1903).*

to use federal courts does not necessarily conflict with a restriction on the venue of national bank suits in state courts. As has been pointed out, the two can co-exist.

The Texas Supreme Court chose not to rely on the original enactment of the 1887 act, but to rely instead on the simultaneous express repeal of the 1882 act, and re-enactment of the 1887 act as *28 U. S. C. §1348*. This took place in 1948.[13] This 1948 activity, the Texas court reasoned, showed that §1348 "did not actually repeal" the 1882 act, but re-enacted it in different language, indicating the intention of Congress to limit *12 U. S. C. §94* so as to apply only in federal courts. No reason is given for this conclusion, nor is any authority cited in support of it.

As to its state court venue requirement, the 1875 statute is still in effect, and the Texas Supreme Court erred in refusing so to hold.

II. A RECENT TEXAS DECISION DEMONSTRATES THAT THIS SUIT CANNOT BE A LOCAL ACTION UNDER THE RULE OF CASEY V. ADAMS.

In his brief (pp. 28-34), appellee contends that this suit is a local action by state statute, within the rule of *Casey v. Adams, 102 U. S. 66 (1880)*. Appellant's position on this is discussed in its brief (pp. 33-35) and its reply brief (pp. 14-16). Appellee's basis for his claim that this suit is a local action is that it is made so by statute. The statute relied on reads:

> "New Lawsuits. The Court of competent jurisdiction of the county in which the delinquency proceedings are

[13] See Notes 3 and 4.

pending under this Article shall have venue to hear and determine all action or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."[14]

We have previously shown that the determination of whether an action is "local" or "transitory" under *Casey v. Adams* is a matter of federal law, a guide to which is set out in the *Casey v. Adams* opinion itself.[15] But in any event, a recent decision by the Texas Supreme Court holds that even as a matter of state law actions by the statutory insurance receiver-liquidator are not "local" in any sense.

It is *Langdeau v. Burke Investment Company*, decided June 20, 1962, by a unanimous Texas Supreme Court.[16] The *Burke Investment* case involved an alleged conflict between the above-quoted Texas statute [§4(f), Article 21.28, Insurance Code of Texas], and the Texas statute providing that suits involving land "must be brought in the county in which the land, or a part thereof, may lie."[17] The *Burke Investment* case involved land situated in Bexar County, Texas. It was instituted against the insurance receiver, who attempted to remove it to Travis County, the county where delinquency proceedings were pending. The Texas Supreme

[14]Section 4(f), Article 21.28, Insurance Code of Texas, General and Special Laws of Texas, Acts 54th Legislature, Regular Session, 1955, ch. 267, p. 737, 742.

[15]See Reply Brief of Appellant Republic National Bank, pp. 14-16; also Mercantile National Bank's Reply Brief on the merits, p. 10.

[16]*C. H. Langdeau, Receiver v. Burke Investment Co.,* Tex. , 358 S. W. 2d 553 (1962), affirming 351 S. W. 2d 287 (Tex. Civ. App., San Antonio, 1961).

[17]Article 1995 (14), Revised Civil Statutes of Texas.

Court held that Bexar was the proper county because the mandatory venue statute relating to land overcame the *permissive* provision of the Insurance Code quoted above. In referring to the Insurance Code section, the Texas Supreme Court ruled:

> "It does not provide that the actions mentioned therein shall or must be brought in the county where the receivership is pending. Venue to hear and determine the proceedings is conferred upon the courts of that county, but there is *nothing* to suggest that the lawmakers intended for such courts to have exclusive venue of all suits by or against the receiver. Exception 28a, which contains language of similar import, has been held to be permissive and not mandatory. *Mutual Fire & Automobile Ins. Co. v. Kirkham*, Tex. Civ. App., 231 S. W. 2d 459 (no writ). As pointed out by the court in that case, a declaration that 'venue shall lie' in a certain county is not equivalent to a command that the suit 'must be brought' in that county. It merely signifies an intention to give the plaintiff the legal right, if he chooses, to maintain such a suit there. This, it seems to us, is the meaning which should be attributed to the provisions of Section 4(f)."[18]

The significance of this opinion is that the Texas Supreme Court has definitively held that the Texas statute (which appellee contends in this case is mandatory) is not mandatory but is permissive. That statute does not prescribe exclusive venue in Travis County; thus, there is no basis even under appellee's theories of "locality" on which it can be said this is a statutory local action. The *Casey v. Adams* exception does not apply.

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[18] *Tex. , 358 S. W. 2d 554-555.*

CONCLUSION

For the reasons stated herein, and those stated in its original and reply briefs, appellant Republic National Bank of Dallas respectfully submits that the judgment of the Supreme Court of Texas is erroneous and should be reversed, and the cause remanded with a direction that the Texas Supreme Court order the transfer of appellee's action against this appellant to Dallas County, Texas, pursuant to the provisions of *Title 12, U. S. C., § 94.*

Respectfully submitted,

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PROOF OF SERVICE

I, Neth L. Leachman, attorney for Republic National Bank of Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of , 1962, I served copies of the foregoing Supplemental Brief on the appellee by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for appellee at the following post office addresses:

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